

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 602 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

DHIRAJLAL NANJIBHAI

Versus

STATEOF GUJARAT

Appearance:

MR KR RAVAL for appellant

Mr.S.R.Divetia, Addl. PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 26/03/98

ORAL JUDGEMENT (Per Soni J.)

Appellant - accused in Sessions Case No.130/90 is convicted under sec.302 and 324 of I.P.C. and is sentenced to suffer R.I. for life and S.I. for six months; in default, S.I. for one month for respective offences by judgment and order dated 9.8.91 passed by

Additional Sessions Judge, Junagadh. The learned Judge has also ordered that the sentences shall run concurrently.

Facts of the prosecution case, in short, are as under:-

In the afternoon at about 4.00 PM on 16.8.90, deceased Ramesh Mulji and his cousin brother Kishore Veljibhai were returning from their field named Sadak. When they reached near the shop of one Manubhai Raghavbhai of village Bamangadh, accused Dhirajlal met them on the way. At that time, shop of Manubhai was

closed. Said Dhiraj scolded both of them, saying that "you are to be killed as you are taking interest in Sawadhaya activity. You have taken out procession of Sawadhaya on 7th and 8th of the month and you tried to be the elder brother". So saying, he gave abuses pertaining to mother and sister and he took out knife from the waist. When they saw Dhirajlal drawing out knife from the waist, they turned back and tried to escape. Dhirajlal chased them with knife and caught hold of Ramesh. Kishore intervened to save Ramesh. However, before anything could be done, Dhirajlal inflicted knife blow on the chest of Ramesh and in the process of saving Ramesh, Kishore was also injured on the fingers of right hand and left hand elbow. Dhirajlal tried to inflict blow on Kishore with a view to kill him, which was warded off by Kishore by both hands. Ramesh being injured, fell there and by that time, Devabhai Tapu and Tejabhai Shambhubhai came there and got Kishore escaped from Dhirajlal. By that time, Dhirajlal ran away with knife in his hand. As persons of the village had gathered, Ramesh was taken to Jetpur Government Hospital in the car of Gordhanbhai Sheth and Kishore went to the hospital on motor cycle of one Govindbhai Chanabhai. Ramesh has succumbed to the injuries on his reaching at Jetpur hospital. Dr. Balochia of Jetpur Government Hospital telephoned Jetpur City Police Station that one Ababhai Devrajbhai Patel of Bamangadh, Taluka Bhesan, had come with the dead body of one Rameshbhai Muljibhai. Police Station Officer took down that information at Janva Jog entry no.19 and entrusted further enquiry to Head constable Premprasad. He also wrote to Executive Magistrate to draw inquest panchnama. One Sitaram Dev Murari, Secretary of the Cooperative society, Bamangadh also informed Bhesan Police Station that one Dhirajlal Nanjibhai Khant has inflicted knife blow on one Patel Ramesh Mulji in Bamangadh village and injured is sent to Bhesan Government hospital. Police Station Officer, on receipt of the information, informed P.S.I. on duty, who then proceeded for Bamangadh. P.S.I. Prabhatsinh, who

was informed by P.S.O. about that information received from Secretary, Cooperative Society, Bamangadh, proceeded to Bamangadh with his staff via Bhesan hospital. He drew panchnama of the scene of offence through Police Head Constable. He then proceeded to Jetpur. He recorded the complaint of injured Kishore in Jetpur Hospital and it was sent to Bhesan Police Station for registering the offence. On offence being registered, Prabhatsinh P.W. 19 commenced investigation and on completion of the same, he submitted chargesheet against the accused in the court of J.M.F.C., Junagadh, who, in his turn, committed the case against the accused to the Sessions Court for trial.

Learned Additional Sessions Judge framed charge against the accused under sections 302 and 324 of I.P.C. and section 37(1) read with 135 of Bombay Police Act. Accused pleaded not guilty and claimed to be tried. Prosecution led necessary evidence to prove the charge levelled against the accused. On completion of the evidence of prosecution, further statement of accused under sec.313 of Criminal Procedure Code, 1973 was recorded. From the nature of cross-examination of prosecution witnesses and the further statement, it appears that the defence of the accused is of total denial and according to the accused he is wrongly roped in because of the enmity between Khants and Patels of the village. The learned Additional Sessions Judge, however, recorded the conviction and passed sentences, as noted above.

Learned Advocate Mr.K.R. Raval appearing for the appellant ('accused' for short) has challenged the conviction on the ground that the prosecution has failed to prove beyond reasonable doubt that it is the accused, who has inflicted blow on Ramesh, as a result of which Ramesh has died. In the alternative, it is contended that in the facts and circumstances of the case, case of the accused would fall within the purview of sec.304 Part II and not under sec.302 of I.P.C. Mr.Raval further contended that there is only one eye witness in the case i.e. P.W.5, who is an interested and partisan witness and in absence of any independent corroboration, his evidence ought not to have been accepted by the learned Additional Sessions Judge. Mr.Raval further contended that injuries on the person of the accused as proved vide certificate Ex.14 suggest that there was scuffle as a result of which injuries might have been caused on the deceased and, therefore, the case would fall within the purview of sec.304 Part II of I.P.C. Mr.Raval, therefore, contended that the appeal should be allowed and accused be acquitted or in the alternative the conviction be altered to one under sec.304 Part II.

Learned A.P.P. Mr.Divetia supports the judgment

of the learned Addl. Sessions Judge. Mr.Divetia contended that there is nothing in the evidence of Kishore P.W.5 to reject his evidence. Simply because independent witnesses are not available, that by itself is not a ground to reject the evidence of witness, who is available and whose presence is more probablised than his absence. Mr.Divetia further contended that in the facts and circumstances of the case, case of the accused is squarely covered under sec.300 of I.P.C. and is not entitled to any benefit of any Exception to that section. Mr.Divetia, therefore, contended that the judgment and order of conviction and sentence does not call for any interference.

It is not disputed that deceased has died a homicidal death. Deceased has died a homicidal death is proved by the evidence of P.W.1 Dr. Sureshkumar, who has performed autopsy. As per the evidence of Doctor, there is only one external injury, which is as under:-

"A stab wound over Rt. chest wall in the 2nd intercostal space . 2-5 cm from the midline, verticle C clean cut edges, almost parallel, slightly curved each other, sharp angle two extremities of wound, length of wound 3 cm x 1 cm cavity deep."

According to the doctor, there are as many as 13 internal injuries and they are as under:-

- "1.A Haematoma below skin of (Rt) side of chestwall 10 cm x 8 cm.
2. Pectorals major muscle (RT) cut corresponding to external injury no.17(1).
3. Costal cartilage of (RT) 2nd rib cut partially.
- 4, Costal cartilage of (RT) 3rd rib cut.
5. Inter costal muscles of the 2nd Inter costal and 3rd inter costal muscles cut corresponding to external injury no.17(1).
6. Pleura cut corresponding to external injury no.17(1)
7. Trachea pale
8. Pleural cavity on (RT) side contain clotted blood 1.4 liter
9. A stab wound over upper lobe of (RT) lung 3 cm x 1 cm x 8 cm deep.
10. Pulmonary artery upper pulmonary vain and burnous cut on (Rt) lung root.
11. Cut section of both lung - pale
12. Pericardium pale (Lt). Ventricle empty .(Rt) ventricle contain clotted blood.
13. Rest of the major vessels - MAD".

Doctor has stated that the cause of death is due to shock as a result of hemorrhage due to injury to right lung.

This injury, as per the doctor P.W.1, is sufficient in the ordinary course of nature to cause death. According to the doctor, said injury can also be caused by knife, muddamal article no.14. We will refer to the cross-examination of this doctor on the question of injury, when we will be discussing the evidence of the eye witness.

Question is who caused the injury because of which the deceased has died. According to the prosecution, it is the accused who has caused the injury and to prove the same, prosecution has relied on evidence of P.W. 5 Kishore, who was also injured in the very incident. Prosecution has no doubt examined other two witnesses, namely, Teja and Deva P.W.6 and P.W. 13 respectively, but they are at the most supporting witnesses in the sense that they have reached the scene of offence immediately after the incident is over. They have not seen the commission of act of the accused. We will, therefore, consider the argument of Mr.Raval that evidence of Kishore P.W.5 cannot be relied on, though he is an injured witness, as he is an interested and partisan witness and he can also be said to be a chance witness. P.W.5 in his deposition before the court has stated that they were returning from the field named Sadak by about 5.00 PM in the evening and when they reached near the shop of Manubhai, which was closed at that time in Bamangadh, accused met them from opposite side. He gave abuses in the name of mother and sister and told them that "you are taking interest in Sawadhaya activity" and threatened them. He also told them that "you are trying to be elder brother and you have taken out procession of Sawadhaya on 7th and 8th of the month. I, therefore, will kill you". So saying, he took out knife from his waist. Both of them being afraid, they turned back and proceeded in the direction from where they came. Accused, therefore, ran behind them and caught hold of Ramesh and inflicted knife blow on his chest. This witness intervened to rescue Ramesh and caught his hand, which had a knife. He was injured on the right hand finger and left hand. Ramesh fell down at that place, being injured with knife. By that time, Devabhai and Tejabhai had come and Devabhai and Tejabhai got escaped Dhirajlal from the grip of Kishore P.W. 5. On being released, he ran away with blood stained open knife on the way from where he had come.

This witness had come from Surat to Bamangadh before 2 - 3 days, as he received a message that his old mother is sick. In the early hour of that day, there was verbal exchange with this accused. However, no complaint was filed. This witness whenever used to come to Bamangadh from Surat, used to attend his field. Some time

he would be accompanied by Ramesh. An attempt is made to show that the evidence of this witness is not believable from the following facts stated by this witness in cross-examination:-

Witness has stated that at the time when the incident took place, Ramesh and he had reached near the shop of Manubhai and they saw the assailant first from a distance of about 30' and there are no persons nearabout at that time. When the threat was given, he was at the distance of about 20'. The threatening must have continued for about five minutes. They have not replied anything to him. However, he went on giving threats and they proceeded in that direction, but watching on the back. When they were away by about 5' from the shop of Manubhai, accused took out knife and at that time they have tried to run away. In running, he (witness Kishore) was ahead of Ramesh. Ramesh was chased by the assailant. Ramesh did not defend; nor there was any grabbing.

Simply because these distances are shown, that by itself does not suggest that what P.W.5 says is a lie. Purpose of cross-examination is to find out the truth and not to confuse the witness and by creating a confusion, to claim benefit of doubt. Mental condition of the witness at the relevant time is required to be noted. Witnesses, when they have fear of death, they are not noting down the distances, time, surrounding circumstances, but they are only concerned to save themselves and they try the best what they feel best in their opinion to save themselves. It is contended by Mr.Raval that why this witness and Ramesh did not run away when they saw accused taking out knife from his waist, which they saw from a distance of 30' or 20'. Why they did not shout at that time. The Supreme Court in the case of Rana Pratap (AIR 1983 S.C.680) has held that every witness reacts differently in the situation. Therefore, why did they not shout, why did they not run, all depends on the mental condition of the witness.

Question is : if this witness was not present at the time of incident, how he came to be injured on his both hands ? Dr.Chandulal P.W.2, who examined P.W.5, has referred to his injuries as under:-

1. Rt. dorsum of middle finger one I.W. 1" x 1/8" deep unto bone C severe bleeding.
2. I.W. on the dorsum of Lt.fore arm 1" x 1/4" x 1/2" bleeding."

Defence Advocate Mr.Raval has very emphatically relied on the statement of P.W. 2 in the cross-examination that these injuries are such which can be self-inflicted. Mr.Raval contended that witness has inflicted injuries on his person not only to show his presence at the time of incident, but to add a greater credibility to his

version. Mr.Raval contended that courts are giving more credence to an injured witness than an ordinary witness and, therefore, this witness has got himself injured to get greater credence than any other ordinary witness. It is stated that ignorance of law is no excuse. This conveys that everyone is presumed to know law. Which witness is preferred by the court by itself is not a law, but it all depends upon the facts and circumstances of each case. It has happened that even the injured witnesses are not relied upon by the court and it has also happened that ordinary witnesses - simple onlookers - are relied upon by the court. Thus, when it is not a law that an injured witness is preferred than an ordinary witness, it cannot be said that this witness P.W.5 to get more credence and credibility inflicted injury on himself for establishing his presence at the scene and time of the occurrence. If this witness was an ordinary person, there was no reason for him to injure himself. Witnesses do not know that if they are not injured, they will not be believed by the court. Normally witnesses make statements before the court as to what they have seen at the relevant time. It is then for the court to decide whether they can be believed or not. Therefore, in our opinion, there is no reason not to accept the evidence of this witness and learned Additional Sessions Judge has not erred in accepting his evidence.

Evidence of P.W.5 in our opinion is further supported by the evidence of P.W.6 and P.W.13. P.W.6 Tejabhai has come to the scene of offence and has seen Ramesh in an injured condition and Kishore P.W.5 being present there. So also, P.W.13 Devabhai had come to the scene of offence and has seen Ramesh lying injured and Kishore P.W.5 being present there. If we look at the map ex.18, incident appears to have taken place in the business locality. However, shops are proved to be closed at the relevant time. Two witnesses Tejabhai and Devabhai P.W.6 and P.W.13 respectively were just residing in the near about locality and they have gone to the scene of offence on hearing some hubbub and when they went there, they also found accused with blood-stained knife with him. At the time when they both reached, they found accused caught by Kishore P.W. 5 and he was got released by Devabhai P.W.13. In the cross-examination of P.W.6, an attempt was made to show that there was scuffle and grabbing, but, in our opinion, that part of evidence of witness P.W.6 is not an evidence. It is only a suggestion in the cross-examination. Thus, presence of Kishore P.W. 5 is established by the evidence of P.W.6 and P.W.13.

Mr.Raval contended that if P.W.5 was injured on his hand, how could he have gone to Jetpur on a motor

cycle. There is nothing on record to show that motor cycle was driven by this witness Kishore. He may be a pillion rider and on proper reading of the evidence, he was a pillion rider. Therefore, the question of his inability to drive does not arise.

Evidence of P.W.5, in our opinion, is further corroborated by the fact that knife was seized from the accused, who was arrested from his in-law's place. From the evidence of Vanmali P.W.14, the house of the father-in-law of the accused was shown by the brother of the accused and accused was sitting in the house and he himself has shown the knife. We do not find any reason not to accept the evidence of Vanmali P.W.14. Incident is of 16.8.90 and accused is arrested on 17.8.90 by panchnama drawn between 20.30 and 22.05 hours. When accused came to be arrested, no injuries on his person are noticed by the panchas. Knife is seized at that time and that knife was stained with human blood of AB group. From the report of Serologist at Ex.28, the blood group of the deceased also appears to be of AB group.

Thus, it is proved from the above discussion that P.W. 5 was present at the time of incident and prosecution has proved beyond reasonable doubt that it is the accused who inflicted blow on the chest portion of the accused, in all probability by knife - muddamal article no.14. Dr.Sureshkumar P.W.1 has stated that injury found on the person of the accused can be caused by muddamal article no.14.

When an injury is proved to have been caused by accused and said injury is sufficient in the ordinary course of nature to cause death, as proved by P.W.1, question is what is the offence committed by the accused? If we read clause Thirdly of sec.300, the case of the accused squarely fall within the purview of that clause. There is no evidence worth the name to show that there was any scuffle; nor there was grabbing so as to attract any of the Exceptions to sec.300. In view of the judgment in the case of Virsa Singh vs. State of Punjab 1958 SC 465, case of the accused squarely falls within the purview of sec. 300 Clause Thirdly. In our opinion, learned Additional Sessions Judge has rightly held that the case of the accused falls under sec.302 and not under sec. 304 Part II.

By the evidence of P.W.5, it is also established vide certificate Ex.12 issued by Dr.Chandulal P.W.2 that injuries on the person of P.W.5 were caused by the accused by muddamal knife and he has committed offence under sec.324 I.P.C.

In view of the above discussion, we do not find any reason to interfere with the finding arrived at by learned Addl. Sessions Judge. Any arguments of learned

Advocate Mr.Raval do not find favour with us. Appeal is,
therefore, liable to be dismissed and is hereby
dismissed.
